



UNIVERSITY OF MARYLAND
**AGRICULTURE LAW
EDUCATION INITIATIVE**
EMPOWERING THE STATE

Legal Resources for Improving Soil Health on Leased Land

Agriculture and
Environmental Law
Conference



Sarah Everhart, ALEI Senior Legal
Specialist and Research Associate

Improving Soil Health on Leased Land



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
EMPOWERING THE STATE

- According to the 2012 USDA Census of Agriculture, 42% of the total acres in Maryland are leased.
- Although last year around 25% (over 500,000 acres) of land was enrolled in the state cover crop program and conservation tillage is being employed on almost half of the acres in agricultural production, just under 4% of Maryland's agricultural acres was enrolled in federal conservation programs.
- Further, in 2017 only 23% of the Maryland Agricultural Water Quality Cost-Share (MACS) contracts for conservation practices were with tenants.



Why do we care?

- Conservation practices provide economic benefits to farmers through decreased input costs, government cost-share incentives, and more opportunities to market to sustainably-minded consumers.
- Environmental benefits include improved soil health, improved water quality, and less soil erosion, which can ultimately increase the value of a parcel of land.

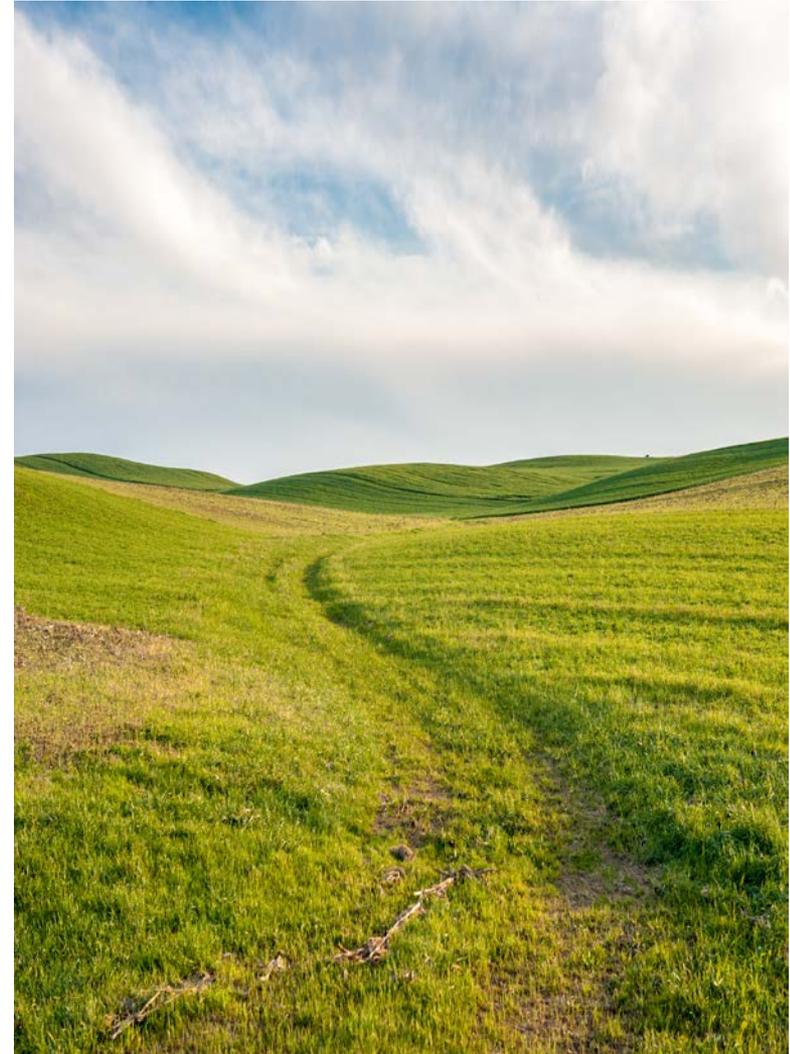


Improving Soil Health on Leased Land



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
EMPOWERING THE STATE

- Challenges?
 - Communication breakdowns
 - Landowners' lack of knowledge of farming and conservation practices
 - Lack of a written lease
 - Indefinite or short lease term
 - Financial uncertainties surrounding conservation practices
 - Risk aversion



Improving Soil Health on Leased Land



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
EMPOWERING THE STATE

- Legal Challenges
 - Oral leases
 - A handshake lease leaves both parties at risk of faded memories, misunderstandings and fights with new owners, heirs, etc.
 - Legal gray areas
 - Little lease law in Maryland.
 - No implied covenant of good husbandry.
 - What is good farming?
 - Solutions?



Improving Soil Health on Leased Land



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
MPOWERING THE STATE

- ALEI in collaboration with the Harry R. Hughes Center for Agroecology, Inc. is creating a *Agricultural Conservation Leasing Guide* to help both landowners and tenants overcome these challenges.
 - Leasing strategies
 - Communication tools



Communicating About Conservation Values



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
EMPOWERING THE STATE

- What are your concerns related to the environmental health of the farm and/or the impact of the farm on the surrounding environment?
- Is there a Soil Conservation & Water Quality Plan “conservation plan” for the farm?
 - If yes, it is current? Is it referenced in the lease?
 - If no, are you willing to work with conservation professionals to create one?

Communicating About Conservation Values



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
EMPOWERING THE STATE

- What is holding you back from putting conservation practices in place on the farm?
- How can you achieve improved soil health and on-farm conservation while safeguarding profitability?



Using a Lease to Improve Soil Health on Leased Land



- A good lease protects both parties and provides assurance.
- Required soil health/conservation practices should be outlined in a lease.
 - A conservation plan may be referenced and compliance required.
 - Alternatively, specific preferences such as reduced tillage, crop rotation, etc. may be outlined.
 - Copy of nutrient management plan provided to landowner.

Using a Lease to Improve Soil Health on Leased Land



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
EMPOWERING THE STATE

- Consider consequences of failure- is it a breach of the lease? Is there a grace period to allow for correction?
- If it is not a part of the lease neither party will have grounds to terminate the lease for failure to adhere to a practice or plan.



Using a Lease to Improve Soil Health on Leased Land



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
EMPOWERING THE STATE

- Consider the lease term
 - The longer the term the more invested the farmer will be in the land.
 - What if you can't extend the term?



Using a Lease to Improve Soil Health on Leased Land



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
MPOWERING THE STATE

- Consider Alternatives that Give Assurance.
 - A Right of First Offer or Refusal
 - A Right of First Offer is negotiated to give the holder (farmer) the first chance to purchase the land when it is ready for sale.
 - A landowner can accept or deny the offer. Holder of the right has a limited time to respond.

Using a Lease to Improve Soil Health on Leased Land



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
EMPOWERING THE STATE

- A Right of First Refusal gives the holder (farmer) an opportunity to match an offer made on the property.
- Can be difficult for the holder to match the offer in a limited time frame.
- Both RFOs and RFRs need to be drafted and reviewed by attorneys.



Using a Lease to Improve Soil Health on Leased Land



- What to do if a conservation practice will negatively impact yields/profits?
 - Consider a cost-share or flex-cash lease instead of cash rent.
 - Allows landowners to share in risk.
 - A graduated rent schedule can be used to address an initial impact to yields/profits.
 - Alternatively, rent can be discounted for a period of time.
 - If adjusting rent is not possible, consider offering an extended term to compensate for an impact to yields/profits.

Using a Lease to Improve Soil Health on Leased Land



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
EMPOWERING THE STATE

- What to do if a conservation practice requires an initial investment from the farmer?
 - Allocate costs of a conservation practice in the lease.
 - Consider initial costs and long-term (maintenance, repair, etc.).
 - Consider using a depreciation schedule to encourage a farmer to make an investment knowing he or she will be repaid if leasing relationship ends before practice reaches maturity.

Using a Lease to Improve Soil Health on Leased Land



- Troubleshooting Conservation in a Lease
 - Maintenance
 - If a landowner expects the farmer to handle the maintenance that responsibility should be in the lease and part of the deal.
 - Be specific with exact dimensions and specifications included.
 - Buffers tend to shrink over time.
 - Allocate payment for herbicides for weed control in buffers, etc.
 - Conservation practices will require maintenance and cost-share funding will be at risk if maintenance is neglected.
 - Agree to meet annually to verify practices with a walk-through.

Using a Lease to Improve Soil Health on Leased Land



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
EMPOWERING THE STATE

- Troubleshooting Conservation in a Lease
 - Soil Samples
 - How will a landowner monitor for soil fertility?
 - If a landowner intends to take periodic soil samples this right must be expressly reserved in a lease.
 - Landowner will not have access to farmer's nutrient management plan soil samples.
 - Consider reviewing soil test results as part of an annual conversation between landowner/farmer.

Using a Lease to Improve Soil Health on Leased Land



UNIVERSITY OF MARYLAND
AGRICULTURE LAW
EDUCATION INITIATIVE
EMPOWERING THE STATE

- Troubleshooting Conservation in a Lease
 - Maintaining the Leasing Relationship
 - Leases can and should be amended over time.
 - Both parties need to communicate about farming and conservation practices and
 - Be willing to adjust practices and lease parameters to maintain the lease relationship and improve the operation.



Questions/Thanks

Look for the *Agricultural Conservation Leasing Guide*, Spring 2018.

Questions?

Sarah Everhart

severhart@law.umaryland.edu

410-458-2475

